Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 2001

No. _____

MARVIS JETT,

Petitioner,

vs.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the demotion and reduction in salary from a twenty-seven (27) year secretarial position to a Teacher's Aide position, allow the demoted secretary to resurrect time barred claims of disparate treatment under the continuing violation theory, that began five years earlier when her secretarial duties were replaced with Teacher's Aide duties?

Whether the time limitation as set forth in 42 U.S.C. § 2000e-5(e) is satisfied, sufficient to invoke the continuing violation theory, if at least one unlawful employment practice occurred within 300 days of the filing of a charge of discrimination.

Whether the applicability of a continuing violation, in the absence of substantive law, is a factual determination to be made by the jury.

Whether, after a jury verdict for the Plaintiff in a race discrimination case, it proper for the Appellant Court to review whether the Plaintiff established a prima facie case and reverse the jury verdict on that basis.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1 (b) of the Rules of the Supreme Court of the United States.

1. Marvis Jett, Plaintiff/Appellee;

2. Washington County School Board, Defendants/Appellant;

3. Carolyn Davis Cummings, Attorney for the Plaintiff/Appellee; and

4. William R. Mabile, III, Attorney for the Defendant/Appellant.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Marvis Jett, (hereinafter Jett) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered February 1, 2001 in Case No. 00-11554, Marvis Jett v. Washington County School Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. It is attached as an appendix, p. A1.

JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals entered February 1, 2001. Petitioner's petition for rehearing with suggestion for rehearing en banc was denied March 14, 2001, a copy of which is attached at Appendix, p. A13. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C.

Section 1254 (1).

STATUTORY PROVISION INVOLVED

The statute construed is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), et seq., which says: "It shall be unlawful practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; and 42 U.S.C. § 2000e-5(e) which provides that a charge of discrimination must be filed within 300 days after the alleged unlawful employment practice occurred. The pertinent sections of the statute are set forth at Appendix, p. A 14.

STATEMENT

A jury in the Northern District of Florida found that Jett was transferred and demoted because of her race. Pursuant to the jury verdict, the District Court for the Northern District of Florida entered an Amended Judgment dated February 25, 2000. A copy of the judgment is appended hereto at Appendix, p. A1.

The Unites States Court of Appeals for the Eleventh Circuit reversed, and held: (1) that the Plaintiff's claim with respect to her job transfers was barred by the statute of limitations because she did not file a timely charge of discrimination; and (2) the Plaintiff failed to establish a prima facie case of discrimination with respect to the commensurate salary policy. The opinion of the Court of Appeals which reversed the jury verdict is dated February 1, 2001 and is unpublished. A copy of the opinion is attached hereto at Appendix, p. A1.

(FACTS)

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e), et seq., by Petitioner, Marvis Jett (hereinafter Jett) to recover seniority, back pay, loss benefits and for pain, suffering and emotional distress. Jett had worked for Respondent, Washington County School Board, (hereinafter School Board), for twenty-two (22) years as the only

black secretary in the District Office and with more seniority than any of the other eight secretaries in the District Office, until she was selected to be moved out of the office in 1989, allegedly because of reassignment of duties and because of the need for fewer secretaries. Thereafter, Jett was demoted to a Teachers' Aide position in 1994, at age fifty-five (55). From 1989 to 1994, Jett was required to work in menial positions performing the task of a Teachers' Aide. In 1990 and 1992 she was transferred from one menial task in a hostile environment to another menial task. During the period of being shifted from place to place, Jett remained a secretary in title, salary and benefits until July 1994, when she was ultimately demoted. The School Board claimed Jett was demoted because of the adoption of a new policy that gave it the authority to pay employees commensurate with their job duties and responsibilities.[1]

In 1989, after the School Board promised not to reduce her salary to a Teacher's Aide salary but to place her in a lateral transfer status,[2] Jett did not file a charge with the Equal Employment Opportunity Commission or with any other state agency protesting her removal from the District Office. Jett's efforts to be returned to a secretarial position included speaking with two different School Superintendents on numerous occasions doing the period from 1989 to 1994, and both represented that they were looking out for her and would consider placing her back in a secretarial position when a vacancy occurred.

At the time the policy was adopted, the School Board knew that Jett would suffer a salary reduction and was aware that she was the only secretary who was performing the duties of a Teacher's Aide. Before the effective date of the policy, Jett appeared before the School Board and requested that her salary not be reduced, as the School Board had promised to maintain her secretarial salary as a lateral transfer, five years earlier. Jett was not successful. When the policy became effective, Jett's salary was reduced from

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[1] In July 1993, the School Board adopted a policy, effective July 1, 1994, who purportedly gave it the authority to pay employees who had been demoted or transferred, commensurate with the position to which they had been demoted or transferred to.

[2] The policy utilized by the Respondent at the time defined a lateral transfer of non-instructional/support personnel as the movement from one position to another which does not have a subsequent change in salary.

approximately $17, 881 annually to $12,171 annually. No other secretary was immediately affected by the policy.

On July 24, 1994, approximately five years after her involuntary removal from the District Office, Jett filed a charge of discrimination pursuant to Title VII of the Civil Rights Act of 1964, as amended. Jett complained that she was demoted and discriminated against in the terms and conditions of employment. On July 14, 1998, the Equal Employment Opportunity Commission issued Jett a "right to sue" letter and on October 13, 1998, this lawsuit was filed in the Fourteenth Judicial Circuit Court in Washington County, Florida. On January 20, 1998, the School Board filed a Notice of Removal of the complaint from State Court to the United States District Court for the Northern District of Florida.

On June 19, 1999, Jett filed an amended complaint in which she alleged to have been continuously discriminated against on the basis of race, when the School Board removed her from the District Office in 1989 and required her to perform duties of various lesser positions in hostile environments, while no other white secretaries were similarly treated. Jett's complaint also alleged that the School Board was aware that she was the only secretary who had been reassigned to perform duties of a position with lower pay when the salary policy was adopted.

On June 23, 1999 the School Board moved for Summary Judgment, taking among other positions that Jett did not file a timely charge of discrimination and that she could not establish a prima facie case with regards to the application of the salary policy.

In response to the Summary Judgment motion, Jett asserted that the School Board carried on a discriminatory employment practice against her on the basis of race beginning in 1989, which was ongoing and continuous and that her complaint should be deemed timely because there was a substantial nexus between the School Board's assigning her to perform Teacher's Aide duties beginning in 1989, the subsequent transfers and her ultimate demotion to the Teacher's Aide position in 1994.

Jett raised equitable estoppel and equitable tolling as other relevant principles for tolling the statute of limitations. Jett alleged she was induced to her detriment, not to file a complaint of discrimination by the Respondent, when in 1989, she was promised that he salary would remain at the same level. Jett urged that even

while being subjected to uncertainty about job assignments, it was too much to expect her to file an action during the period that she believed she was secure in her title and salary. On October 8, 1999 the District Court entered an Order denying the School Board's Motion for Summary Judgment.

At trial, Jett established that from 1989 to 1994, the School Board voted continuously annually to assign her to perform Teacher's Aide duties and responsibilities, while no other white secretaries were assigned such duties or voted on annually. Jett also introduced evidence which questioned whether the authority to adjust salaries commensurate with duties and responsibilities was the reason behind the adoption of the 1994 policy, because the School Board already had the authority and was exercising the authority to adjust salaries commensurate with duties and responsibilities, prior to the adoption of the policy. The unrefuted evidence at trial showed that other School Board employees had been demoted for cause, with salary reductions to their demoted positions in 1989 and 1992. The School Board's Representative also testified that school principals had been transferred to other administrative positions with salary adjustments, prior to the effective date of the 1994 policy. The evidence also showed that after the adoption of the policy, there was at least one white School Board employee who did not suffer a salary reduction after being demoted to a lower position.

On October 20, 1999 the jury returned a verdict for Jett and awarded her a total of $134,000 which included $34,000 for back pay, $14,000 for lost benefits and $86,000 for pain and suffering.

On appeal to the United States Court of Appeal for the Eleventh Circuit, the School Board took the position that the District Court erred by not granting its summary judgment motion and its motion for judgment notwithstanding the verdict, regarding Jett's transfers, because neither the continuous violation theory nor equitable principles saved Jett's time-barred claims. The School Board argued the lack of a substantial nexus between Jett's transfers and the salary policy sufficient to trigger the continuous violation theory, and furthermore that the salary policy did not make permanent any allegedly discriminatory act concerning Jett's transfers.

Nevertheless, the School Board agreed that Jett's charge was timely regarding the salary policy but argued that she had not established a prima facie case of racial discrimination because

similarly situated white persons were also affected by the salary policy.

Jett's position before the Court of Appeals was the same as had been advanced before the District Court; i.e. the School Board's summary judgment and judgment notwithstanding the verdict motions were properly denied because Jett established equitable reasons for tolling the statute of limitations. The School Board was estopped from raising the statute of limitations as a bar because the 1989 decision not to reduce her salary was designed to prevent her from filing a charge of discrimination. She was actively misled with the maintenance of her secretarial salary for five (5) years and with promises of being placed back into a secretarial position during the same period that the School Board maintained her secretarial salary.

Furthermore, the elements of similarity, frequency and permanency were sufficiently present to trigger the continuing violation theory and thus, provide the necessary nexus between her time-barred transfers to Teachers' Aide duties and her timely charge regarding being demoted to the Teacher's Aide position. Indeed, Jett advanced the position that the salary policy and her ultimate demotion made permanent the School Board's discriminatory actions against her for five (5) years which mandated annually that she perform the duties of a Teacher's Aide. Additionally, Jett emphasized that a prima facie case of disparate treatment as well as pretext had been established with regards to the salary policy because (1) the School Board admitted that of the six white employees it advanced to demonstrate reductions due to the salary policy just as Jett, that all of them could not attribute their salary reductions to the policy in question; and (2) there was at least one white employee who was demoted to a lesser position but suffered no salary reduction.[3]

On February 1, 2001, a panel of three judges from the Court of Appeals for the Eleventh Circuit reversed the jury verdict and ordered dismissal of Jett's case with prejudice. The panel concluded with regards to equitable tolling and equitable estoppel: "The fact that Jett backed off from her threat to file a charge of discrimination after being allowed to keep her salary in no way

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[3] The jury heard testimony that one white male, Jerry Tyre's salary remained the same after he was demoted from Principal, a higher paying job, to director of Transportation. (Doc. 84 pg. 16-17).

means she was mislead about her legal rights or ability to file a charge....[t]his Court determines that the limitations period was not tolled for this entire period and the charge filed on July 27, 1994 was untimely with respects to her demotion and transfers."[4] Thereafter, the court did not address Jett's "continuous violation" claim of being a victim of the School Board's past, current and continuing discriminatory practices against her nor did it address her claims that the past discrimination had been perpetuated by the adoption of the facially neutral current salary policy.

The panel also found that the district judge erred in holding that Jett had proven the elements of a prima facie case, concluding that "[s]he failed to show that the Board treated similarly situated white employees differently. Further, the panel opined: "Even if Jett had proven the elements of a prima facie case, the district judge was still required to grant summary judgment (or later judgment as a matter of law) on Jett's commensurate salary claim since the Board articulated a legitimate nondiscriminatory reason for its adoption of the policy and Jett did not show that the reason was pretexual."

Jett petitioned the Court for rehearing and rehearing en banc on February 22, 2001. That petition was rejected on March 14, 2001. Jett now brings this petition for a writ of certiorari within ninety (90) days from the date the request for rehearing was denied.

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[4]The panel made a factual error when it deemed Jett to have been demoted when she was transferred in 1989, when her demotion was effective July 1, 1994, pursuant to a vote of the Board July, 1993.

REASONS THE WRIT SHOULD BE GRANTED

I. THIS COURT SHOULD GRANT CERTIORARI SINCE THE DECISION BELOW DEMONSTRATES CONFUSION AND LACK OF UNIFORMITY AMONG THE CIRCUITS REGARDING THE APPLICATION OF THE CONTINUING VIOLATION THEORY AND THE ELEMENTS NECESSARY TO SUCCESSFULLY CHALLENGE ONGOING DISCRIMINATORY POLICIES AND PRACTICES THAT HAVE A NEXUS TO VIOLATIONS WITHIN THE CHARGE FILING PERIOD.

The continuous violations theory is a judicially created theory that suspends the commencement of the applicable charge filing period if a defendant's violation of the law is deemed to be continuing in nature. Application of the theory allows a Plaintiff to reach back and get relief for actions of discrimination that occurred outside the statute of limitations period by linking it as one continuous act, with a discriminatory act that took place within the limitation period. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977).

Section 2000e-5 (e)(1) (1997) of Title 42 allows a charging party 300 days from the date of the alleged unlawful practice to file a charge with the Equal Employment Opportunity Commission, when the party has also timely filed with a proper state agency. The Eleventh Circuit determined that since Jett was transferred and demoted in 1989, her charge filed with the state agency on July 27, 1994, just fifty-five (55) days after the School Board notified her in writing of her reduction to a Teacher's Aide salary, was untimely.[5] By reaching this conclusion, the Eleventh Circuit totally ignored the facts and documents in the record, erroneously concluded that Jett failed to timely file and failed to consider the discriminatory action of reducing her salary by thousands of dollars, which action was clearly within the charge filing period.

With regards to facts necessary to sustain a charge of

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[5] The School Board letter dated June 2, 1994, which notified Jett of her demotion, salary reduction, loss of annual leave and reduction in annual work days to a 196 day contract was part of Jett's evidence that was admitted at trial, and is included in the Appendix, p. A16.

continuing violation that would address present effects of past discrimination, this Court has observed that the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists: "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful....the emphasis is not upon the effects of earlier decisions; rather, it is upon whether any present violation exists." *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L. Ed. 2d. 431 (1980), citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977).

In determining whether a discriminatory employment practice constitutes a continuing violation, the Eleventh Circuit distinguishes between the present consequence of a one time violation, which does not extend the limitation period, and the continuation of that violation into the present, which does. *Carter v. West Publishing Company*, 225 F. 3d 1258, 1263 (11th Cir. 2000); See also *Ross v. Buckeye Cellulose*, 980 F. 2d 648 (11th Cir. 1993). Even applying the method generally observed by the Eleventh Circuit, Jett's charge should have been deemed timely because undisputedly, her salary reduction occurred within the 300 day window of the charge filing date.

In other instances, some courts in the Eleventh Circuit and the Fifth Circuit continue to determine whether the continuing violation theory is applicable by employing a three factor analysis, which consists of whether the alleged discriminatory acts are related by subject matter, frequency and permanence. *Roberts v. Gadsden Memorial Hospital*, 835 F. 2d 793 (11th Cir. 1988), where the three factors were held not to be sufficiently present; See also *Cabiness v. YKK (USA), Inc.*, 859 F. Supp. 582, 586 (M.D. Ga. 1994), aff'd, 98 F. 3d 1354 (11th Cir. 1994).[6]

Several other circuits agree with the Fifth Circuit and the Eleventh Circuit that a three prong analysis is required to determine if a continuing violation has occurred. See *Robbins v. Jefferson County School District*, 186 F. 3d 1253, 1257 (10th Cir. 1999) (stating to determine whether the alleged acts of discrimination

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[6] The Eleventh Circuit adopted the Fifth Circuits' continuous violation doctrine. which employs the three prong analysis as set forth in *Berry v. Board of Supervisors of L.S.U.*, 715 F. 2d 971, 981 (5th Cir. 1983), cert. denied, ____ U.S. ____, 107 S. Ct. 232, 93 L. Ed. 2d 158 (1986).

constitute a continuing violation or are discrete unrelated acts we employ a three-factor inquiry: we consider: "(i) subject matter-whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence-whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate*); Rush v. Scott Specialty Gases, Inc.* , 113 F. 3d 476, 481 (3rd Cir. 1997) (stating we have followed *Berry v. Board of Supervisors of Louisiana State University*, 715 F. 2d 971 (5th Cir. 1983), the leading case on the continuing violation theory, where that court enumerated several factors relevant to the determination of whether a plaintiff has demonstrated a continuing violation).[7]

Other circuits continue to require a plaintiff to establish at a minimum, that one definable incident of discrimination occurred within the relevant filing period, to invoke the continuing violation theory. See *O'Loghlin v. County of Orange*, 229 F. 3d 871 (9th Cir. 2000) (stating with regards to an ADA violation, if a discriminatory act takes place within the limitations period and that act is "related and similar to" acts that took place outside the limitations period, all the related acts-including the earlier acts are actionable as part of a continuing violation), citing to *Anderson v. Reno*, 190 F. 3d 930, 936 (9th 1999); *Fielder v. UAL Corp.* 218 F. 3d 973, 987-88 (9th Cir. 2000) and *Draper v. Coeur Rochester, Inc.*, 147 F. 3d 1104, 1108-11 (9th Cir. 1998). In finding that the discrimination against *O'Loghlin* was continuous, the Ninth Circuit suggested that a logical and fair consequence of its application of the continuing violations doctrine is that a defendant cannot insulate itself from liability by engaging in a series of related violations of Title VII and then asserting that the statute of limitations has run for the first violation in the series. *O'Loghlin*, supra, 229 F. 3d 871 at 875.

Unlike the Eleventh Circuit, the Ninth Circuit opined that an important purpose of the continuing violation doctrine is to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort. *Id.* Under the Ninth

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[7] The Third Circuit agreed with the District Court's determination that Rush suffered from continuous sexual harassment, which consisted of derogatory remarks, rude behavior, and discriminatory conduct. *Rush v. Scott*, 113 F. 3d 476, 483 (3rd Cir. 1997).

Circuit's rationale, arguably Jett's claims of continuous discrimination would have survived and yielded different results because at least one act and the most recent act of discrimination complained of was within the relevant time period, as sanctioned by the Ninth Circuit.

Likewise, the Ninth Circuit further observed in *Draper, supra,* that a genuine issue of material fact existed as to whether the alleged hostile work environment continued into the relevant limitations period under the continuing violation doctrine, and thus precluded summary judgment on the claim. *Draper v. Coeur Rochester, Inc.*, 147 F. 3d at 1107. In reversing the District Court, the Court of Appeals, reiterated that events occurring outside of the limitations period may be considered as a basis for a discriminatory claim, if the events are part of an ongoing unlawful employment practice that continues into the relevant period of limitation. *Id.* at 1107. See also *Beall v. Abbott Laboratories*, 130 F. 3d 614, 621 (4th Cir. 1997) (stating the continuing violation theory is available only where an actual violation has occurred within the requisite time period); *Kline v. City of Kansas City*, 175 F. 3d 660 (8th Cir. 1999) (stating a violation is continuing if it consists of an ongoing pattern or practice of discrimination rather than an amalgamation of discrete, isolated instances); *Ashley v. Boyle's Famous Corned Beef*, 66 F. 3d 164 (8th Cir. 1995) (where the District Court's dismissal of gender discrimination and equal pay claims as time barred was reversed, stating that an employee may challenge ongoing discriminatory acts even if similar illegal acts could have been challenged earlier and are thus time barred).

Some other circuits recognize two types of continuing violations: systemic violations, which have their roots in a discriminatory policy or practice which continues into the limitation period and serial violations, which are composed of a number of discriminatory acts emanating from the same discriminatory animus, with each act constituting a separate wrong actionable under Title VII. *DeNovellis v. Shalala*, 124 F. 3d 298, 307 (1st Cir. 1997). See also *O'Rourke v. City of Providence*, 235 F. 3d 713, 731 (1st Cir. 2001), (stating continuous violation is an equitable exception for otherwise time-barred allegations but there must be some violation within the statute of limitations period that anchors the earlier claims). In *O'Rourke*, the First Circuit; reinstated the jury verdict and sanctioned the application of the serial continuing violation doctrine

to cover discriminatory activity and a hostile work environment that occurred two-and-one-half years prior to the charge of discrimination.[8] See also *Kovacevich v. Kent State University*, 224 F. 3d 806 (6th Cir. 2000) (stating two ways to establish continuing violations: first, if there is evidence of present discriminatory activity and if at least one of the forbidden discriminatory acts occurred within the relevant limitations period, and second, where a plaintiff has demonstrated a long standing and over-aching policy of discrimination).

Compare the Seventh Circuit, which observes three different continuing violation theories. *Place v. Abbott Laboratories*, 215 F. 3d 803 (7th Cir. 2000), stating "three types of continuing violations for purposes of employment discrimination include: where the exact day of the violation is difficult to pinpoint because employer's decision making process takes place over period of time; where the employer has a systematic, openly espoused policy alleged to be discriminatory; and where the employers discriminatory conduct is so covert that its discriminatory character is not immediately apparent. *Id.* at 808.

Many authors and other legal commentators have also discussed the split among the circuits regarding the necessary elements to invoke a continuing violation theory. See Lindemann and Grossman, Employment Discrimination Law, Third Edition, Volume II, *Continuing Violations*, pp. 1351-1363 (1996) stating "unquestionably the biggest area of disagreement and arguably the most muddled area in all of employment discrimination law is that of alleged continuing violation;" Philip J. Pfeiffer, *Continuing Violations*, Employment Discrimination Law," Third Edition, pp. 770-777 (2000), stating "cases addressing the continuing violations theory as an exception to the charge-filing limitations period continue to defy easy description or convenient categorization;" Lisa S. Tsai, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531,

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[8] In O'Rourke, the First Circuit acknowledged its adoption of the three prong analysis first articulated by the Fifth Circuit in *Berry v. Board of Supervisors*, 715 F. 2d 971, 981 (5th Cir. 1983). In finding a "continuing violation" of sexual harassment, the First Circuit distinguished between the approach to cases involving a single act of permanence which would act as a trigger and those involving a series of acts, such as is generally found in sexual harassment cases. *Id.*

532, (2000), stating "[t]he courts of appeals have interpreted this seemingly straightforward doctrine in widely divergent ways, utilizing varying terminology and evaluative standards to adjudicate strikingly similar cases - ultimately resulting in widespread inconsistent application of the doctrine;" Robert J. Reid, Comments: *Confusion in the Sixth Circuit: The Application of the Continuing Violation Doctrine to Employment Discrimination*, University of Cincinnati, 60 U. Cin. L. Rev. 1335, 1345 (1992) stating "[t]he law of continuing violations remains in a state of confusion among the different circuits ... some further guidance from the United States Supreme Court ... could provide some much needed clarity on the question of continuing violations."

II. THE DECISION BELOW FAILS TO APPLY RULES OF THIS COURT AS FORMULATED IN UNITED AIRLINES, INC., v. EVANS AND ZIPES V. TRANS WORLD AIRLINE, INC.

The Eleventh Circuit's holding regarding the continuous violation theory as applied to the facts of this case, is in direct conflict with this Court's teachings in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977). In addition to the split in the circuits, this Court should accept this case for review because the Eleventh Circuit's decision below ignores the necessary inquiry mandated by this Court in *United Air Lines*, i.e., whether any present violations existed. Because Jett filed her charge against present violations as well as past violations, the Eleventh Circuit's holding below is inconsistent with *United Air Lines v. Evans*.

In *United Air Lines* this Court emphasized that allegations that a present system neutral in its operation, discriminates against victims of past discrimination is an essential component to invoke the continuing violation theory. *Id.* at 555. In this case, the School Board did not dispute that Jett had filed a timely charge of discrimination with regards to the current salary policy nor did it dispute that the policy adversely affected Jett and resulted in the diminution of her salary by approximately $5,000. Yet, the Eleventh Circuit refused to address the significance of the alleged current violation to Jett's claims of a continuing violation of discrimination against her. The Eleventh Circuit erred according to the dictates of

United Air Lines.

Likewise, the Eleventh Circuit's decision and that of other circuits cannot be reconciled with the teaching of the Supreme Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), with regards to the overlapping of the statute of limitations question and the substantive law. There the Supreme Court recognized that the doctrines of equitable estoppel and equitable tolling excuse a claimant from having to file before it is feasible to do so, and further observed that a civil rights statute which provides for the judicial process to be initiated by lay persons, should be construed to maximize the likelihood that the claimant will receive the benefit of the law. *Id.* at 393-395, 102 S. Ct. at 1132-1133.

In following the Supreme Court's rationale, the First Circuit recently observed: [I]t would be anomalous to say that for statute of limitations purposes, a plaintiff should be on notice that she has a discrimination claim where the substantive law says she does not have such a claim yet. *O'Rourke v. City of Providence*, supra, 235 F. 3d at 732. The First Circuit also observed that where the substantive law does not resolve when a viable claim accrues, the issue of whether one is the victim of a continuing violation or not is better resolved by juries, with jurors reflecting the lessons from their own life's experiences. *Id.* at 732.

See also *Galloway v. General Motors*, 78 F. 3d 1164, 1166 (7th Cir. 1996), which followed the dictates of *Zipes* and in doing so stated that "we do not want to encourage premature or precipitate litigation." However, at least one other circuit does not appear to follow these principles, see *Merrill v. Southern Methodist University*, 806 F. 2d 600, 605 (5th Cir. 1986), where the Court held that the discriminatory act against the Professor occurred at the time she was denied tenure rather than when she first perceived that a discriminatory motive caused her to be denied tenure. *Id.* at 605.

While the Eleventh Circuit has indeed recognized that a limitations period may be suspended until the facts which would support a cause of action are apparent to a person with reasonably prudent regard for his rights, its holding in this case falls short of reinforcing its precedents or the Supreme Court's principle to the facts of this case. *Sturniolo v. Sheaffer, Eaton*, Inc., 15 F. 3d 1023 (11th Cir. 1994). This case involved a series of disputed facts, which included activities by the School Board, that arguably misled Jett

into believing her salary was secure. There were other indications from the School Board that it would eventually reassign her back to the duties and responsibilities of a secretary. Admittedly, the School Board had maintained her secretarial salary from year to year while assigning her menial tasks and the School Board also voted every year to continue her assignment of performing Teacher's Aide duties. The unrefuted record evidence established that Jett did not foresee and could not have foreseen that she would be demoted to a Teacher's Aide position, without cause, after having worked for over twenty-two (22) years with a good work record as a secretary.[9] Jett had no control over her employment status. The Defendant removed her from the District Office as a Secretary and the Defendant had the authority to move her back to a secretarial position at any time.

Additionally, the School Board's position before the District Court and the Eleventh Circuit supports Jett's decision that substantive law would not have supported the filing of a claim between the period she was supposedly on a lateral transfer and the time she suffered the actual demotion and salary reduction. On page 25 of its Initial Brief, the School Board argued in pertinent part:

> "[a] lateral transfer resulting in no loss of pay, benefits or classification does not generally constitute an adverse employment action. ... See generally *Doe*, 145 F. 3d at 1449-50. ... *Maniccia v. Brown*, 171 F. 3d 1364, 1370 n. 3(11th Cir. 1999) (noting that a lateral transfer with no loss of pay or benefits is not an adverse employment action); ... *Mantandon v. Farm and Indus.*, 116 F. 3d 355, 359(8th Cir. 1997) (finding allegedly retaliatory transfer not adverse because it did not entail change in position, title, salary or any other aspect of his employment, no matter "how[] unpalatable the prospect [of the transfer] may have been to [the employee]").

---

[9] At trial, Jett testified and her personnel file substantiated that, doing the years she worked as a Secretary she never received an adverse evaluation, while the School Board, without documentation tried to establish some deficiencies in her work as a secretary.

Hence, the panel's determination that Jett was unreasonable in relying on statements from two Superintendents for such a long period, ignored the substantive law and the facts of the case as well.

The law is well settled among some Circuits including the Eleventh Circuit, that when the facts are in dispute, a determination of when the statute of limitations begins to run is a question of fact for the jury. *Goldman v. Bequai*, 19 F. 3d 666, 305, U.S. App. D.C. 227 (1994); See also *Borden, Inc., v. Morton's Market, Inc.*, 120 F. 3d, *amended* in part 211 F. 3d 1224, (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2006, 146 L. Ed. 956 (1999); *Bibeau v. Pacific Northwest Research Foundation, Inc.*, 188 F. 3d 1105, (9th Cir. 1999).

Since the facts surrounding Jett's initial transfer, continuous transfers, and ultimate demotion and salary reduction were in dispute, and substantive law did not require Jett to file a charge earlier than the one filed, the Court of Appeals' decision usurping the province of the jury and making a factual decision should be reviewed by this Court.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S REVERSAL OF THE JURY VERDICT ON THE GROUNDS THAT A PRIMA FACIE CASE WAS NOT ESTABLISHED, WITH REGARDS TO THE COMMISERATE SALARY POLICY IS INCONSISTENT WITH THE TEACHINGS OF THIS COURT AND WITH THE APPROACH OF OTHER CIRCUITS THAT CONSIDER THE TOTALITY OF THE EVIDENCE

This Court has clearly established that after a trial on the merits, an appellate court should not focus on the analysis of whether the elements of the prima facie case were established, but should assess the ultimate question of discrimination vel non- whether the defendant intentionally discriminated against the plaintiff. *United States Postal Service Board v. Aikens*, 460 U.S. 711, 714-715, 103 S. Ct. 1478, 1481-1482, 75 L. Ed. 2d 403 (1983).

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court also reversed the Fifth Circuit's reversal of a jury verdict on two grounds:

(1) the Fifth Circuit had ignored the Plaintiff's evidence which supported his prima facie case of age discrimination, and (2) the Fifth Circuit ignored the evidence which challenged the employers legitimate non-discriminatory reasons for his termination. *Reeves*, 147 L. Ed. 2d at 119. This Court held that a jury could rely solely on evidence of pretext to infer discrimination and further held that a prima facie case of discrimination combined with sufficient evidence for a reasonable fact finder to reject the legitimate non-discriminatory reasons, is adequate to sustain a finding of liability. *Id.* at 115, 121.

Secondly, this Court in *Reeves* addressed what a reviewing Court should consider upon an appeal of the denial of a Rule 50(b) motion. The Court concluded that the reviewing Court should review the record evidence and draw all reasonable inferences in favor of the nonmoving party, but, it may not make credibility determinations or weigh the evidence; credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.* at 122.

In this case, the reviewing Court found that the Plaintiff had not established a prima facie case or established pretext, when the record in fact reveals that not only did similarly-situated whites not suffer a pay reduction from the policy in question but also that the Defendant exercised authority to adjust salaries commensurate with job duties and responsibilities prior to the adoption of the policy in 1994. Evidence that there were white employees who suffered demotion, but not salary reduction, established disparate treatment and therefore the Plaintiff's prima facie case. Likewise, evidence that the Defendant exercised the authority to adjust salaries before the effective date of the policy clearly cast doubt upon the Defendants "business necessity" reasons for adoption of the policy. Viewing all the evidence most favorable to Jett, a reasonable jury could believe that Jett was discriminated against and a reasonable jury found that Jett had been discriminated against. The jury weighed this evidence properly.

In *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), this Court held that disbelief of the legitimate nondiscriminatory reasons set forth by the employer, coupled with the Plaintiff's prima facie case, is sufficient to permit the fact finder to infer discrimination and to support a jury finding of discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 508-11. Further, the Court observed that a Plaintiff is

entitled to survive summary judgment and judgment as a matter of law, when sufficient evidence exists to demonstrate the existence of a genuine issue of fact as to the truth of the employer's proffered reasons. *Id.* The Eleventh Circuit's panel decision in this case, contravenes this Courts clear directions in *St. Mary's Honor Ctr.* as well.

The Eleventh Circuit's holding is also in direct conflict with the recent holding of the Sixth Circuit in *Kovacevich v. Kent State University, supra, at* 224 F. 3d 806. In an almost identical procedural situation, the Sixth Circuit reversed the decision of the District Court, that had determined after a jury trial on the merits, that the claimant failed to establish a prima facie case on Title VII and Equal Protection Act claims. *Id.* at 822. There the Court held that as a matter of law the District Court erred and stressed that the teachings of *Aikens, supra,* with regards to the role played by the prima facie case apply to both district and appellate court reviews of verdicts, i.e. the totality of the evidence should be considered in a light most favorable to the plaintiff to determine if reasonable jurors could find discrimination. *Id.* at 827. The entry of judgment as a matter of law is always precluded once a Plaintiff has established a prima facie case and has shown sufficient evidence to allow a fact-finder to disbelieve an employer's proffered explanation for its actions. See also *Mitchell v. Baldridge*, 759 F. 2d, 80, 245 U.S. App. D.C. 60 (1985) (stating once a Title VII case has been fully tried on the merits, whether prima facie case was established is no longer relevant); *and Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F. 3d 581, 587 (5th Cir. 1998) (stating after a case has been fully tried on the merits, the inquiry of appellate courts becomes whether the record contains sufficient evidence to support the jury's conclusion).

The Eleventh Circuit's disregard for *Reeves* and *St. Mary's Honor Ctr.* as well as its conflict with the approach of other circuits, justifies the grant of certiorari to review the decision below that reversed the jury's decision.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

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Counsel for Petitioner
850-224-3730
850-224-2202 Facsimile

Dated: June 11, 2001

IN THE
Supreme Court of the United States
October Term, 2001

No. _____

MARVIS JETT,
Petitioner,
vs.

WASHINGTON COUNTY SCHOOL BOARD,
Respondent.

APPENDIX "A"

Carolyn D. Cummings
FLORIDA BAR NO.: 0353442

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

MARVIS JETT,)
Plaintiff,)
vs.) **CASE NO. 5:99CV13-SPM**
)
WASHINGTON COUNTY SCHOOL)
BOARD,)
Defendant.)

AMENDED JUDGMENT

This action came before the Court and jury with United States District Judge Stephan P. Mickle presiding. The issues have been tried and the jury has rendered its verdict.

It is **ORDERED AND ADJUDGED** judgment is entered in favor of Plaintiff, MARVIS JETT, and against Defendant, **WASHINGTON COUNTY SCHOOL BOARD,** as set forth in the verdict awarding the Plaintiff, MARVIS JETT:

Total verdict amount: $134,000

Plaintiff is awarded pre-judgment interest based on an annual rate of 5.411% in a sum certain of $8,861.14 on the back pay and benefits award of $48,000 ($34,000 back pay and $14,000 benefits).

Post-judgment interest shall accrue at an annual rate of 5.411% upon the filing and entry of this judgment on the docket as provided by law.

ENTERED ON DOCKET 3/23/00 BY CG
(Rule 77 (d) FRCivP or 32(d)(1) & 63 FRCrP)
Copies mailed to: Cummings, Mabel

Plaintiff shall be reinstated to a position with pay equivalent to what she was making before her demotion, with all pay raises, changes in pay grade and benefits she would have received but for her demotion. The reinstatement shall take place upon the beginning of the pay period beginning on or about March 1, 2000.

Attorney's fees and costs are allowed as provided by law.

ROBERT A. MOSSING, CLERK

Date: February 25, 2000 Carolyn Hudson
Deputy Clerk

cc: Carolyn D. Cummings
Cummings, Hobbs & Wallace, P.A.
462 West Brevard Street
Tallahassee, Florida 32301

William R. Mabile, III
Fuller, Johnson & Farrell, P.A.
Post Office Box 1739
Tallahassee, Florida 32302-1739

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U. S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 1, 2001
No. 00-11554 THOMAS K. KAHN
CLERK

D.C. Docket No. 99-00013-CV-5-SPM

MARVIS JETT,

Plaintiff- Appellee,

versus

WASHINGTON COUNTY SCHOOL BOARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(February 1, 2001)

Before TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

*Honorable Robert L. Vining, Jr., U. S. District Judge for the Northern District of Georgia, sitting by designation.

VINING, District Judge:

In this action, brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 **U.S.C.** ' 2000e, *et seq.*, the jury returned a verdict in favor of the plaintiff in the amount of$134,000.OO. The defendant appeals the district court's denial of its (1) motion for summary judgment, (2) motions for judgment as a matter of law, made at the close of the plaintiffs case and at the end of the trial, and (3) motion for new trial. Concluding that the plaintiffs claim with respect to her job transfers is barred because she failed to file a timely charge of discrimination and concluding that the plaintiff failed to make a prima facie case of discrimination with respect to the defendant's commensurate salary policy, this court reverses.

I. BACKGROUND

Marvis Jett was hired by the Washington County School Board ("Board") in 1967 and was the first black secretary to be employed in the District Office. In *1985,* Jett's supervisor retired, and his duties (property and textbook management) were reassigned to other district administrators. Four years later, in April 1989, Superintendent Kelly Brock called Jett into his office and told her that she was being transferred to the media center because the District Office had too many secretaries. When Jett threatened to file a discrimination complaint, since she was the only black secretary in the District Office and had more seniority than the other secretaries, Brock stated that he would laterally transfer her, allowing her to maintain her salary and job title.[1]

---

[1]Jett contends that she was transferred so that a white secretary, Sandra French, could have her job. The Board concedes that French took on some of the duties previously handled by Jeff but argues that Jett had not had those duties since 1985, when the duties had been dispersed to other secretaries.

Jett was extremely unhappy at the media center and complained on numerous occasions about how the other staffers there, two white females, treated her. In August 1990, Jett was transferred to Chipley High School, where she performed teacher's aide duties but was paid her higher secretarial salary and benefits. In 1992, Jett was again transferred, this time to Roulhac Middle School. Jett assisted with the In-School Suspension Program, performing the duties of a teacher's aide but retaining her secretarial salary and benefits.

In 1993, after giving public notice as required by Florida's Administrative Procedure Act, the Board adopted a policy whereby demoted employees would be paid salaries commensurate with their new positions. That policy stated: "Effective July 1, 1994 all employees who have been reassigned or who are reassigned (transferred) to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned" Phillip Roundtree, who was Chairman of the Board at the time of the trial, testified that the impetus behind his making this proposal was that a principal had been demoted to a classroom teacher position but was still retaining his principal's salary (approximately $10,000 more than he would have been entitled to as a classroom teacher). Roundtree testified that he thought it was unfair to pay a demoted person the same salary he received before being demoted. The policy affected everyone who had been demoted, including at least three white males. Jett was the only black person affected, and her annual salary was reduced by approximately $4600.00.

On July 27, 1994, Jett filed a charge of discrimination with the Florida Commission on Human Relations. The Commission found the charge to be without merit, and on July 14, 1998, the Equal Employment Opportunity Commission adopted the findings of the Florida Commission and issued a

right to sue letter to Jeff. On October 13, 1998, Jett filed suit in state court alleging that she had been discriminated against because of her race in violation of 42 U.S.C. § 2000e, *et.*;[2] on January 27, 1999, the Board removed the action to the United States District Court for the Northern District of Florida.

The Board filed a motion for summary judgment, which the district court denied. The case proceeded to trial. The Board moved for a directed verdict at the close of the plaintiffs case and again at the close of all the evidence.[3] Following a jury verdict in favor of Jett in the amount of $134,000 ($34,000 for back pay, $14,000 for lost benefits, and $86,000 for pain and suffering), the Board moved for judgment notwithstanding the verdict. The district court denied that motion and, likewise, denied the Board's motion for new trial. This appeal then followed.

II. STANDARD OF REVIEW

This court reviews de novo the denial of a motion for summary judgment, but the review is based upon all the evidence adduced in the district court, not simply the evidence before the court at the time it ruled on the motion. *Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778 (11th Cir. 1991). This court reviews de novo a district court's determination of a Rule *50(b)* motion. *See, e.g., Combs v. Plantation Patterns,* 106 F.3d1519,1526(11th Cir.1997). In doing so, "we must consider all the evidence in the light most favorable to [the nonmovant] and determine'whether or not reasonable jurors could have concluded as this jury did based on the evidence presented."' *Id.*

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[2]Jett also asserted other claims but those were subsequently dismissed and were not pursued either at trial or on appeal.

[3]Although counsel used the terms "directed verdict" and, later, "judgment notwithstanding the verdict," these motions are now termed "judgment as a matter of law." *See* Rule *50,* Federal Rules of Civil Procedure.

(quoting Quick v. Peoples Bank, 993 F.2d 793, 797 (11th Cir. 1993)).

III. DISCUSSION

Ordinarily, a charging party must file a claim with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful activity. However, if the charging party has instituted proceedings with a state agency authorized to address the alleged unlawful activity, the charging party is given 300 days from the date of the activity to file the claim. 42 U.S.C. § 2000e-5(e). This time requirement, since it is not jurisdictional, may be tolled under certain circumstances. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127 (1982). In the instant case, it is undisputed that Jett filed her charge more than 300 days after her demotion and transfers occurred. Therefore, unless the 300-day period is tolled, Jett's claims of discrimination with respect to her demotion and transfers are time barred.

The limitations period does not begin to run "until the facts which would support a charge of discrimination are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Sturniolo v. Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). Nevertheless, "a plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected... group knows enough to support filing a claim." *Blumberg v. HCA Management Co.*, 848 F.2d 642, 645 (11th Cir. 1988). The limitations period is also tolled during the time that an employer actively misleads an employee with false promises of another position, i.e., the period is equitably tolled "until such time as it is or should be apparent to an employee with a reasonably prudent regard for his rights that the employer has ceased to actively pursue such a position." *Cocke v. Merrill Lynch & Co.*, 817 F.2d *1559*, 1561 (11th Cir. 1987).

In the instant case, Sandra French began working in the District Office within a very short time after Jett's initial transfer, in 1989. Furthermore, left does not contend that she was unaware of French's employment at the District Office during this period of time. Thus, this case is unlike *Sturniolo,* where the plaintiff, who had been told that his position was being eliminated in an effort to consolidate sales territories, later learned that his sales territory had not been eliminated and that, in fact, a younger person had been hired to replace him. The plaintiffs charge, filed within 180 days of learning about the replacement, was considered timely. "The date when Sturniolo knew or should have known that Sheaffer had hired a younger individual to replace him is the date upon which the tolling period should commence." *Sturniolo,* 15 F.3d at 1026.

Jett also contends that the decision not to reduce her salary in 1989 was designed to prevent her from filing a complaint of discrimination. Even if that were the effect of the decision, such action did not *prevent* Jeff from filing a charge of discrimination. The fact that Jett backed off from her threat to file a charge of discrimination after being allowed to keep her salary in no way means that she was misled about her legal rights or her ability to file a charge.

As a final matter Jeff argues that Brock's repeated statements that he would consider her for a secretarial position in the District Office if an opening occurred should also toll the limitations period. Even assuming that the statements were couched in such affirmative tones that Jeff would have been misled about the Board's intention not to return her to a secretarial position, this court concludes that it would not have taken a reasonably prudent person more than two years to ascertain that the statements were false. Jeff was initially transferred in 1989 but did not file a charge of discrimination until 1994. For Jett to have relied upon statements by Brock and Superintendent Bill Williams for such a long period of time was inherently unreasonable. This court determines that

the limitations period was not tolled for this entire period and that charge filed on July 27, 1994, was untimely with respect to Jeff's demotion and transfers.

The court now turns to the commensurate salary policy, adopted by the Board effective as of July 1, 1994. That policy required that "all employees" who had been demoted or transferred be paid commensurate with the position to which they had been demoted or transferred.

To present a prima facie case of race discrimination based upon circumstantial evidence and alleging disparate treatment, a plaintiff must utilize the framework set out *in McDonnell Douglas Corp. v. Green,* 411 U.S. 792,93 S.Ct. 1817 (1973). She must show that (1) she belongs to a racial minority, (2) she was subjected to adverse employment action, (3) her employer treated similarly situated employees outside her racial classification more favorably, and (4) she was qualified for the job. *See Holjfield v. Reno,* 115 F.3d 1555 (llthCir. 1997).

Even assuming that Jett met the other requirements, this court finds that she failed to show that the Board treated similarly situated employees differently. Jett offered no evidence that similarly situated white employees were not affected by this policy. Indeed, Jett testified that of the persons who suffered pay cuts in 1994 as a result of the policy, she was the only black person affected; all the others were white. (Trial Transcript, Vol. I, p. 129). Thus, the evidence clearly showed that the policy was applied to all employees of the Board and that blacks and whites were treated identically under the policy. The district judge erred in holding that Jeff had proven the elements of a prima facie case.

Even if Jett had proven the elements of a prima facie case, the district judge was still required to grant summary judgment (or, later, judgment as a matter of law) on Jett's commensurate salary claim since the Board articulated a legitimate nondiscriminatory reason for its adoption of the policy and

Jett did not show that the reason was pretextual.[4] Dr. Beverly Helms, Director of Administrative Services of the Washington County School Board, and Phillip Roundtree, a Board member, both testified that the school system was experiencing financial problems and that the impetus behind adoption of the policy was to stop paying demoted employees salaries that were higher than those salaries being paid to others doing the same work. Trial Transcript, Vol. II, pp. 13 1-137, 147-152. Jeff presented no evidence to show that these reasons were pretextual.

IV. SUMMARY

Because Jett failed to file a timely charge of discrimination with respect to her job transfers and because she failed to show the Board's commensurate salary policy was the product of discriminatory animus, the judgment of the district court is

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[4]Once a plaintiff presents a prima facie case of racial discrimination, the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000). "To satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Department of Community Affairs v. Burdine*, 450 U.s. 248, 257, 101 5.Ct. 1089, 1096 (1981). If the employer meets this burden of production, the plaintiff must then establish that the defendant's proffered reasons for the action it took were pretextual. *Lee*, 226 F.3d at 1253.

REVERSED and the case is REMANDED with instructions that Jett's claims be dismissed with prejudice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11554-DD

MARVIS JETT,

Plaintiff-Appellee

versus

WASHINGTON COUNTY SCHOOL BOARD,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19_, _____F.2d_____)

Before: TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge

PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Bane are

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

DENIED.

*Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

United States Code, Title 42: Section 2000e-5(e), Page 556-557 (1997 Ed.).

(e) Time for filing charges; time for service of notice of charge on respondent filing of charge by Commission with State or local agency; seniority

(1) A charge under this section shall be flied within one hundred and eighty days alter the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge Is made within ten days thereafter, except that In a case of an unlawful employment practice with respect to which the person aggrieved has Initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days alter the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system Is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved Is injured by the application of the seniority system or provision of the system.

United States Code, Title 42: Section 2000e-2(a), Page 546 (1997 Ed.).

§2000e-2. Unlawful employment practice.

(a) Employer practice.

It shall be an unlawful employment practice for an employer-

(1) to fall or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

A-16

Washington County
District School Board
206 N. 3rd Street
Chipley, Florida 32428

June 2, 1994

Bill Williams
Superintendent of Schools
(904) 638-6222
Fax (904) 638-6226

Ms. Marvis Jett
518 Church Street
Chipley, Florida 32428

Dear Marvis:

This is to confirm our discussion of June 1, 1994. The School Board has approved your employment for 1994-95 as an aide. You are assigned to Roulhac Middle School. As I indicated to you in our meeting, the policy that was approved by the Board on July 12, 1993 says that effective July 1, 1994, all employees who have been re-assigned or who are assigned to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned.

This means that 1) you will no longer receive pay as a school secretary; 2) you will not earn annual leave; 3) you will be employed on a one hundred ninety six (196) day contract on the aide salary schedule; and 4) you will be paid for your annual leave accrued and not used as of June 30, 1994. Our, records reflect that you will have 2168 days annual leave as of June 30, if you have not used or do not use any

additional days beyond those we have on file at the district office. You will receive pay for these, consistent with School Board Policy rather than being allowed to continue to use them at your's and the Principal's discretion.

I am attaching a copy of the board policies and procedures that apply to your situation. I have highlighted the information that I have referenced.

At the June 20 School Board meeting I will recommend that you be employed at Chipley High School for the month of July to assist in the summer school program. Mr. Pat Williams will make your specific assignment and will supervise you.

Feel free to contact me if you have any questions.

Sincerely,

Bill Williams, Superintendent
WASHINGTON COUNTY SCHOOLS

CC: School Board Members
Pat Williams, Principal - Chipley High
Calvin Stevenson, Principal - Roulhac Middle

Supreme Court U.S.
FILED
JUL 9 2001
CLERK

No. 00-1852

In The

Supreme Court of the United States

MARVIS JETT,

Petitioner,

v.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case, which determined in part that the continuous violation theory did not save some of Petitioner's otherwise time-barred claims, conflicts with case law from other circuits?

2. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case conflicts with *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) and/or *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) on the subject of whether a continuous violation was present in this case?

3. Should this Court grant certiorari upon the ground that the Eleventh Circuit's opinion in this case conflicts with *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) and/or *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) on whether, after a trial on the merits, it is proper for an appellate court to consider whether a plaintiff has established a prima facie case of discrimination under Title VII?

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STATEMENT OF THE CASE

The School Board wishes to clarify and expand upon the factual statement provided by its employee, Petitioner Marvis Jett. This case concerns the School Board's acts of transferring Jett three times and adopting the below-enumerated policy. Each fact below is supported by the record the Eleventh Circuit reviewed.

From 1967 to 1989, Jett was a secretary in the School Board's district office. In 1989, Jett was the only black secretary of the eight at work there. That year, School Superintendent Kelly Brock determined that the district office had too many secretaries. Therefore, Brock elected to transfer Jett to the district media center. The legitimate reason for this transfer was the alleviation of overstaffing in the district office.

When informed of this transfer, Jett told Superintendent Brock that he was discriminating against her. Jett threatened to file a lawsuit. Superintendent Brock then told Jett that, though she would be performing teachers' aide duties at the media center, Brock would allow Jett to retain her designation as secretary and higher secretary-level pay rate. This privilege had never before been afforded to any School Board employee. Other employees had been demoted and had their pay correspondingly reduced.

Jett worked at the media center for one year and did not enjoy her tenure there. Jett requested to be moved. Therefore, in August 1990, Jett was transferred from the media center to Chipley High School. The legitimate reasons for the transfer were that Jett was unhappy at the media center and Chipley High School needed help converting from manual to automated records. Jett continued

to perform teachers' aide duties at Chipley High School but was paid the higher pay afforded to secretaries. She also enjoyed working there, and termed Chipley High School "a loving environment."

In August 1992, Jett was transferred to Roulhac Middle School. The legitimate reason for this transfer was that Roulhac needed additional assistance with its in-school suspension program. There, Jett continued to perform teachers' aide duties but retained her higher secretary pay and benefits.

In 1993, the School Board was experiencing financial problems. The School Board became concerned with its informal practice (which began with Jett) of continuing to pay some demoted employees at their pre-demotion pay rate. This concern was prompted by a white male principal's potential retention of pay after his upcoming demotion to a teaching position – Principal Phil Flater would soon be retaining his $50,509 salary while serving in a $40,347 teaching position. Therefore, the following policy was proposed, noticed to the public and duly promulgated:

> Effective July 1, 1994 all employees who have been reassigned or who are reassigned (transferred) to a position with lower pay will be paid on the salary schedule commensurate with the position to which they are assigned.

The legitimate reason for this policy was to save money.

Jett was affected by this policy – her salary was reduced by about $4600 per year to reflect her teachers' aide position. In other words, she was no longer paid

secretary salary and benefits for performing the duties of a teachers' aide.

Jett's Petition for Writ of Certiorari contains a recurring misstatement of fact regarding this "commensurate salary policy." Contrary to her assertion,[1] Jett was not the only person affected by this policy. Principal Flater was affected. Another white male, Calvin Stephenson, had his salary reduced by $2100 commensurate with his previous transfer from middle school principal to elementary school principal. This policy also affected Jerry Tyre, a white male who was transferred from Director of Transportation to teacher and suffered an $8600 pay reduction. All told, this policy saved the School Board over $20,000 in the first year of its application.

Jett's Petition contains another misstatement regarding the policy. Jett asserts that Jerry Tyre's salary remained the same even though he was demoted after the enactment of the commensurate salary policy. (Jett's Petition at 6). This is untrue and not supported by the record evidence. In fact, a School Board representative specifically testified at trial that Tyre was reassigned from the high school principal position to the lower-paying director of transportation position, and then subsequently to

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[1] Jett asserts that the School Board "admitted that of the six white employees it advanced to demonstrate reductions due to the salary policy just as Jett, that all of them could not attribute their salary reductions to the policy in question." (Jett's Petition at 6). The School Board did not admit that. The School Board has steadfastly maintained (and the Eleventh Circuit agreed) that at least three white males were affected by this policy in addition to Jett. In fact, Jett was the only black person affected by this policy.

the lower-paying position of teacher, and accordingly suffered an associated $9000 pay reduction.

Following her reduction in pay, Jett filed state administrative proceedings against the School Board on July 27, 1994, claiming that the School Board violated Title VII by intentionally discriminating against Jett on the basis of her race when it transferred her in 1989, 1990 and 1992 and when it passed and implemented the commensurate salary policy. This charge was found to be without merit by the Florida Commission on Human Relations ("FCHR").

Thereafter, Jett filed the instant lawsuit in the state courts of Florida. The School Board removed the matter to the United States District Court for the Northern District of Florida. On June 23, 1999, the School Board moved for summary judgment on the grounds that (1) Jett's failure to timely file an administrative complaint with the FCHR barred her claims of racial discrimination pertaining to her transfers, (2) Jett failed to demonstrate a prima facie case of racial discrimination, and (3) Jett did not demonstrate that the School Board's proffered legitimate reasons for its actions were pretexts for discrimination. The School Board's motion for summary judgment was denied by the court on the ground that genuine issues of fact remained. The court did not identify the issues of fact or provide any other legal basis for its decision.

Thereafter, this matter was tried to a jury. The School Board's motions for directed verdict after the presentations of Jett's and the School Board's cases were denied. On October 20, 1999, the jury returned a verdict for Jett in the amount of $134,000. The School Board's motion for

judgment notwithstanding the verdict was denied as well.

The School Board filed a timely notice of appeal. On appeal, the School Board argued to the United States Court of Appeals for the Eleventh Circuit in part that (1) the School Board's motion for summary judgment should have been granted because Jett's claims regarding her transfers were barred by the applicable statute of limitations, (2) the School Board motion(s) for directed verdict should have been granted because Jett did not establish a prima facie case regarding the transfers or the commensurate salary policy, (3) the School Board's motion(s) for directed verdict should have been granted because Jett did not show that the School Board's proffered legitimate reasons for transferring Jett and enacting the commensurate salary policy were mere pretexts for intentional racial discrimination.

In response, Jett argued that, though her administrative complaint was untimely filed as to the transfers, the equitable tolling and continuous violation doctrines saved Jett from the statute of limitations bar. She also argued that there was sufficient evidence in the record to justify the denial of the School Board's motion(s) for directed verdict on the issues of prima facie case and proof of pretext.

The Eleventh Circuit held that the School Board's motion for summary judgment should have been granted as to Jett's transfers because Jett filed state administrative proceedings more than 300 days after the transfers. 42 U.S.C. § 2000e-5(e). The court did not agree that the equitable tolling or continuous violation doctrines saved

the claims regarding the transfers. Furthermore, the Eleventh Circuit held that the School Board's motion for directed verdict should have been granted as to Jett's claim regarding the commensurate salary policy because Jett failed to prove a prima facie case of discrimination. Specifically, the court held that Jett had failed to prove that the commensurate salary policy did not affect similarly-situated white persons. The court further held that even if Jett had proved the elements of her prima facie case, her claim as to the commensurate salary policy must still fail because she did not prove that the School Board's proffered legitimate reason for the policy was a pretext for intentional racial discrimination. (See Eleventh Circuit Opinion in Jett's Petition at A-11).

Having thus ruled that Jett's transfer-related claims were barred by the statute of limitations and Jett's claims regarding the commensurate salary policy were unproved, the Eleventh Circuit reversed the district court judgment and remanded the case with instructions to dismiss Jett's case with prejudice. Jett's petition for rehearing en banc was denied, as was Jett's motion to stay the Eleventh Circuit's mandate while she petitioned this Court. Therefore, the United States District Court for the Northern District of Florida dismissed Jett's case with prejudice. Jett now requests this Court hear her case.

REASONS FOR DENYING THE WRIT

Jett apparently seeks a writ of certiorari pursuant to United States Supreme Court Rule 10(a), which indicates the Court's willingness to consider granting certiorari

when a United States court of appeals enters a decision that conflicts with a decision of another United States court of appeals or a decision of this Court.

Jett's Petition should be denied because the Eleventh Circuit properly reviewed the evidence adduced at trial and properly determined that some of Jett's claims were barred and others were unproven. The Eleventh Circuit's opinion in this action does not conflict with or ignore case law from this Court or from other circuits on any of the subjects presented by Jett.

In addition, Jett's claim that case law from this Court prohibits the appellate court from considering whether Jett established a prima facie case must be denied because, even if Jett is correct, the Eleventh Circuit reached the ultimate issue of discrimination when it ruled that Jett failed to prove that the School Board's proffered legitimate reasons for its action were a pretext for intentional racial discrimination.

Furthermore, Jett's argument to this Court that the Eleventh Circuit should not have addressed whether she proved a prima facie case was not presented to the Eleventh Circuit and therefore should not be reviewed by this Court.

I.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW FROM OTHER CIRCUITS REGARDING THE CONTINUING VIOLATION DOCTRINE.

In subsection I of her Petition, Jett argues that the Eleventh Circuit's opinion demonstrates confusion and lack of uniformity among the circuits regarding the application of the continuing violation theory and the elements necessary to satisfy the associated test. However, the Eleventh Circuit's opinion, which impliedly found that no continuing violation existed, is in full accord with case law from every other circuit in the nation.

It is undisputed that Jett's state administrative proceedings were timely instituted with respect to the commensurate salary policy. The question for the Eleventh Circuit was whether the continuous violation doctrine acted to allow adjudication of Jett's transfers, all of which occurred substantially outside the 300-day statutory time frame. 42 U.S.C. § 2000e-5(e).

To determine whether a continuous violation exists, the Eleventh Circuit utilizes the three-part test expressed first by the Fifth Circuit in *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983). *Roberts v. Gadsden Mem. Hosp.*, 835 F.2d 793, 800 (11th Cir. 1988) (adopting *Berry* test for use in Eleventh Circuit). There are three prongs to the *Berry* determination of whether time-barred acts have a substantial nexus to the act falling within the statutory time period: (1) whether the acts are related by subject matter, (2) whether the acts are isolated and discrete or occur with some frequency or repetition, and (3)

whether the acts are of sufficient permanence to trigger the plaintiff's awareness of her need to assert her rights. *Berry*, 715 F.2d at 981.

In recently adopting the *Berry* test, the First Circuit noted that, allowing for variations in language, the three-prong *Berry* test utilized in the Fifth and Eleventh Circuits is the same test adopted in a majority of other circuits. *O'Rourke v. City of Providence*, 235 F.3d 713, 731 (1st Cir. 2001) (listing cases utilizing *Berry*-like analysis). This statement is supported by an examination of case law from the other circuits. *See, e.g. West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 n.9 (3d Cir. 1995); *Bell v. Chesapeake & Ohio Ry. Co.*, 929 F.2d 220, 223-25 (6th Cir. 1991); *Selan v. Kiley*, 969 F.2d 560, 566-67 (7th Cir. 1992); *Mascheroni v. Board of Regents of Univ. of Cal.*, 28 F.3d 1554, 1561 (10th Cir. 1994). Other circuits, while not expressly adopting the *Berry* test, employ similar standards to determine whether the continuing violation doctrine applies. *O'Rourke*, 235 F.3d at 731 (citing *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) (instances of discrimination must be "specific and related" and plaintiff must be without notice of discriminatory nature of events when they occur); *Curry v. District of Columbia*, 195 F.3d 654, 661 n.14 (D.C. Cir. 1999) (rejecting continuing violation claim because conduct within statutory period not sufficiently similar to conduct without). It is thus clear that the circuits are in agreement on the appropriate test to be administered when determining whether a continuing violation exists.[2]

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[2] While it does appear that the Ninth Circuit has recently rejected the *Berry* analysis, it has done so only in the context of

In an attempt to find inter-circuit conflict where none exists, Jett repeatedly misstates the law of continuing violation. For instance, Jett states that the Eleventh Circuit uses the three-prong *Berry* analysis but that "other circuits continue to require . . . that one definable incident of discrimination occurred within the relevant filing period, to invoke the continuing violation theory." (Jett's Petition at 10). This is no conflict. The Eleventh Circuit requires that a definable incident of discrimination occur within the relevant filing period. *Roberts*, 835 F.2d at 800. The very nature of the continuing violation doctrine expressed in *Berry* is to allow adjudication of time-barred claims if they have a sufficient nexus with an act falling within the filing period. If a plaintiff cannot prove that at least one discriminatory act fell within the filing period, the determination of substantial nexus will not be made.

Jett then asserts that she would have prevailed if the Eleventh Circuit had applied the Ninth Circuit's "test" because she began administrative proceedings within 300 days of the application of the commensurate salary policy. (Jett's Petition at 10-11). However, for various reasons, she would not have prevailed.

First, Jett's statement, quoted above, is not the Ninth Circuit's test for continuous violation. It is merely one implicit portion of every test for continuous violation, however phrased.

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hostile work environment claims. *Fielder v. UAL Corp.*, 218 F.3d 973, 988 (9th Cir. 2000). The instant case is not a hostile work environment case. Therefore, Jett cannot reasonably argue that the Ninth Circuit's analysis in *Fielder* would have created a different result in this case.

Second, Jett's proof fails under the Ninth Circuit's actual test for a continuing violation. In that circuit, one may prove a continuing violation in one of two ways. One might prove a serial violation, which is a series of sufficiently related acts beginning before and continuing into the limitations period. *Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1015 (9th Cir. 2000). This serial violation analysis is essentially the *Berry* analysis – the court is asked to determine whether a sufficient nexus exists between time-barred and timely claims. Otherwise, a plaintiff in the Ninth Circuit must prove a systemic violation, which is a systemic company-wide policy or practice of discrimination. *Id.* at 1015-16. This systemic violation analysis is not at issue in this lawsuit, which concerns allegations that discrete acts were discriminatory. In either case, the plaintiff must prove that the violation continued into the limitations period. *Id.* at 1016.

Jett fails under this Ninth Circuit test (and the test of every other circuit) because she never proved that any discriminatory act fell within the filing period. Only the commensurate salary policy fell within the filing period. Jett did not prove that the commensurate salary policy was a discriminatory act that violated Title VII. The Eleventh Circuit explicitly determined that Jett failed to establish a prima facie case as to the policy and failed to prove that the School Board's proffered legitimate reason for its passage was a pretext for intentional discrimination. Without a discriminatory act *within* the filing period, Jett has no continuing violation extending *into* the filing period. Her claims are time-barred.

To further find inter-circuit conflict where none exists, Jett apparently argues, using *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000) as support, that the Seventh Circuit utilizes a different evaluation when determining whether a continuing violation exists. (Jett's Petition at 12). However, *Place* does not enumerate three different tests for a continuing violation; it simply lists three scenarios in which continuing violations typically manifest themselves. This is made clear by the language in Jett's Petition. In fact, the Seventh Circuit also utilizes the familiar three-prong *Berry* analysis. *Selan v. Kiley*, 969 F.2d 560, 566-67 (7th Cir. 1992). Perhaps this is why Jett does not argue that she would have prevailed under Seventh Circuit case law.

In summary, federal law regarding continuing violation doctrine is clear among the circuits. Every circuit requires a discriminatory act to have occurred within the filing period. The vast majority of circuits expressly utilize the *Berry* three-prong analysis, the crux of which is a substantial nexus between the time-barred acts and the ãct(s) falling within the limitations period. The remaining circuits, though perhaps not expressly adopting *Berry*, unanimously require the same substantial nexus. This is true in the Ninth Circuit, where the court has simply chosen to explain the continuing violation doctrine by enumerating two types of continuing violations. The opinion in this matter would not have been different in any other circuit. With no conflict among the circuits, this Court should deny Jett's petition for writ of certiorari.

II.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW FROM THIS COURT REGARDING THE CONTINUING VIOLATION DOCTRINE.

Contrary to Jett's assertion, the Eleventh Circuit's opinion in this case does not conflict with *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), or *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) on the subject of the continuing violation and equitable tolling doctrines.

Jett argues that the Eleventh Circuit ignored *Evans* by failing to address whether any present violations existed. (Jett's Petition at 13). Jett asserts that the Eleventh Circuit refused to address the significance of the alleged current violation (i.e., the commensurate salary policy). Jett is incorrect. The Eleventh Circuit specifically addressed whether there existed a current violation – it held that no current violation existed because Jett did not prove a prima facie case of discrimination regarding the commensurate salary policy and did not prove that the School Board's legitimate reason for the policy was a pretext for intentional racial discrimination. (Eleventh Circuit Opinion in Jett's Petition at A-10).

Jett then argues that the Eleventh Circuit's opinion conflicts with *Zipes*. Apparently, Jett is now addressing equitable tolling theory and asserting that her transfers did not put her on notice that she had a claim against the School Board. This raises numerous counterarguments.

First, not only would Jett's transfers have placed a reasonable person on notice of the possibility of a claim,

but they directly and personally placed her on notice as well. When informed of her very first transfer, Jett told Superintendent Brock that he was discriminating against her and threatened to file a lawsuit against him. The Eleventh Circuit addressed both these facts in its opinion. In fact, the court specifically distinguished *Sturniolo v. Shaeffer, Eaton, Inc.*, 15 F.3d 1023 (11th Cir. 1994), which Jett now cites to this Court to support her current position. (Eleventh Circuit Opinion in Jett's Petition at A-8 to A-9).

Second, the Eleventh Circuit's opinion does not conflict with *Zipes*, but comports with it. There, this Court held that the filing of a timely charge of discrimination is not a jurisdictional prerequisite to the maintenance of a lawsuit, but a requirement subject to waiver, estoppel and equitable tolling. *Zipes*, 455 U.S. at 393, 102 S.Ct. at 1132. The Eleventh Circuit determination that Jett's claims were not equitably tolled does not conflict with this holding. Jett was afforded the opportunity to argue the issue of equitable tolling in an attempt to save her time-barred claims. She simply did not prevail in that argument.

Third, Jett's argument to this Court is apparently that the Eleventh Circuit misapprehended "a series of disputed facts." (Jett's Petition at 14). The Eleventh Circuit addressed Jett's equitable tolling claim at some length. Jett's Petition contains a large paragraph in which she attempts to convince this Court that the Eleventh Circuit was wrong when it determined that the facts did not support a determination that equitable tolling saved Jett's time-barred claims. (*Id.* at 14-15). This is merely an attempt to have this Court reach a different result under the same rule of law. However, Supreme Court Rule 10

specifically states that this Court rarely grants certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Court should apply that rule to this case and deny certiorari.

Fourth, Jett misconstrues several circuit court opinions that cite to *Zipes* to reinforce her assertion that she could not reasonably have asserted her rights following her transfers. This lies in contravention of Jett's statement to Superintendent Brock and the Eleventh Circuit's factual determination. (Eleventh Circuit Opinion in Jett's Petition at A-5, A-9). Jett also makes the anomalous assertion that the School Board's position that Jett's transfers were not adverse employment actions supports Jett's current argument for equitable tolling because Jett had no claim for her transfers and could not be on notice to file a discrimination charge. If Jett is arguing that the School Board's adoption of the above position establishes equitable tolling in Jett's favor, the School Board disagrees. Jett has cited no case to support this proposition, which would deprive the School Board of its right to make Jett prove that her transfers were adverse employment actions. On the other hand, if Jett is arguing that her transfers were not adverse employment actions, she will find no opposition in this brief.

Fifth, Jett argues that when facts are in dispute, a determination of when the statute of limitations begins to run is for the jury. This is true with regard to virtually all subjects. Conversely, when the facts are not in dispute, a party may be entitled to summary judgment. Here, the undisputed facts enumerated that Jett inexcusably failed to file a charge of discrimination with the appropriate

state agency after personally being put on notice of a potential claim. (Eleventh Circuit Opinion in Jett's Petition at A-8 to A-9). Summary judgment was appropriate.

In summary, the opinion below does not conflict with *Evans* or *Zipes*. The doctrines of continuous violation and equitable tolling were applied in accordance with those cases. Jett simply does not like the result. This Court should not take certiorari to revisit the application of the facts of this case to those doctrines.

III.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH CASE LAW OF THIS COURT REGARDING POST-VERDICT APPELLATE DETERMINATIONS OF WHETHER A PLAINTIFF HAS ESTABLISHED HER PRIMA FACIE CASE.

Jett next argues that this Court should take certiorari review because, pursuant to case law from this Court, the Eleventh Circuit should not have assessed whether Jett had established a prima facie case of discrimination regarding the commensurate salary policy after Jett prevailed at a trial upon the merits. This Court should deny certiorari review of this argument for several reasons.

First, Jett did not raise this argument to the appellate court. The School Board's initial brief to the Eleventh Circuit argued that Jett failed to establish a prima facie case as to both her transfers and the commensurate salary policy. In response, Jett did *not* argue to the Eleventh Circuit that it was improper for the Eleventh Circuit to inquire into the adequacy of her prima facie case. This Court does not decide questions not raised or resolved in

lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976). This principle helps to maintain the integrity of the process of certiorari. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646, 112 S.Ct. 1644, 1649, 118 L.Ed.2d 280 (1992). Because Jett did not raise this argument below, this Court should refuse to entertain it now.

Second, even if Jett is correct that the appellate court should not have reviewed the sufficiency of her prima facie case, this affords her no relief because the court also determined that Jett did not prove that the School Board's legitimate reason for enacting the policy was a mere pretext for intentional discrimination. In other words, even if the prima facie case should not be reviewed on appeal (but should be presumed established), Jett's claim regarding the commensurate salary policy still fails for lack of proof of pretext. The Eleventh Circuit noted this. (Eleventh Circuit Opinion in Jett's Petition at A-10 to A-11).

Third, the opinion below does not conflict with *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). There, the Court expressed "surprise" upon finding out that the court of appeals addressed whether Aikens established a prima facie case after he prevailed at a trial upon the merits. *Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481. At that point, the appellate court should have concerned itself with whether discrimination was ultimately proved by determining whether the plaintiff had directly proved a discriminatory reason for the adverse employment action or indirectly proved discrimination by showing the employer's proffered reason to be unworthy of credence.

Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. In the instant case, even though the Eleventh Circuit addressed Jett's prima facie case, it also specifically addressed the ultimate determination of discrimination – it specifically held that Jett failed to prove that the School Board's proffered reason for the policy was a pretext for discrimination.[3] Thus, the Eleventh Circuit did precisely what *Aikens* tells it to do.

Fourth, the opinion in this case does not conflict with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Jett is correct that *Reeves* held that a plaintiff's prima facie case, combined with sufficient evidence that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. Though it did not cite *Reeves* in its opinion, the Eleventh Circuit expressly considered this. In fact, the court determined that Jett failed to admit evidence that the School Board's asserted justification for the commensurate salary was false. Thus, not only is there no conflict between the opinion below and *Reeves*, Jett's claim fails under the *Reeves* language.

Jett also argues that the Eleventh Circuit violated *Reeves* because *Reeves* mentioned that an appellate court reviewing the denial of a Rule 50(b) motion must examine the record evidence in the light most favorable to the nonmovant. (Jett's Petition at 17). There is no evidence that the Eleventh Circuit did not do that. In fact, the court

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[3] Direct proof of discrimination was not an issue in this case.

expressly noted its requirement to do so. (Eleventh Circuit Opinion in Jett's Petition at A-7). There is no conflict with *Reeves* on this basis – Jett simply does not like the result reached under the appropriate test for reviewing a Rule 50(b) motion. With no conflict, this Court should decline to grant certiorari because Jett is merely arguing that the Eleventh Circuit made erroneous factual findings or misapplied a properly stated rule of law.

In summary, this argument is previously unraised and without merit. The Eleventh Circuit followed the law set forth in both *Aikens* and *Reeves*. No conflict exists. Jett is simply arguing that the wrong result was reached under the proper rules of law. Accordingly, Jett's Petition should be denied.

CONCLUSION

Based upon the foregoing, Respondent School Board of Washington County, Florida respectfully requests this Honorable Court deny the Petition.

Respectfully Submitted,

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(3)

01-1852

IN THE

Supreme Court of the United States

October Term, 2001

No. _____

MARVIS JETT,

Petitioner,

vs.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

Carolyn D. Cummings
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32 pp

RESTATEMENT OF QUESTIONS PRESENTED

WHETHER THE JUDGMENT RENDERED BY THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT WHICH MADE ITS OWN FINDINGS OF FACT AND REVERSED THE JURY VERDICT AND THE TRIAL JUDGES' DECISION THAT A PRIMA FACIE CASE WAS ESTABLISHED, WARRANTS THIS COURT'S IMMEDIATE REVIEW.

WHETHER THE COURT OF APPEALS DECISION BELOW FAILS TO APPLY THE RULE ADVANCED BY THIS COURT IN *UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS.*

WHETHER EVIDENCE IN THE RECORD SUPPORTS JETT'S REPRESENTATIONS TO THIS COURT THAT THE SALARY POLICY ONLY HAD AN IMMEDIATE AFFECT ON HER AND THAT AT LEAST ONE WHITE EMPLOYEES' SALARY WAS INCREASED OR REMAINED THE SAME AFTER HE WAS MOVED TO A LOWER POSITION.

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REASONS FOR GRANTING THE PETITION

I. This court should grant certiorari since the decision the judgment rendered by the United States Court of Appeal for the Eleventh Circuit which made its own findings of fact and reversed the jury verdict and the trial judges' decision that a prima facie case was established, warrants this court's immediate Review 1

II. Certiorari should be granted because the court of appeals decision below fails to apply the rule advanced by this court in *United States Postal Service Board of Governors v. Aikens*..... 2

III. Evidence in the record supports Jett's Representations to this court that the salary

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policy only had an immediate affect on her and that at least one white employees' salary was increased or remained the same after he was moved to a lower position 3

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RESTATEMENT OF THE FACTS

After working for the Washington County School Board as a secretary for over twenty-two years, Jett was selected to be moved out of the District Office in 1989, allegedly because of reassignment of duties and because of the need for fewer secretaries. She had been the only black secretary in the District Office for over (22) twenty-two years with more seniority than any other secretary in the office; yet, she was the one secretary selected to be moved out of the office.

From 1989 to 1984 she was placed in various teachers' aide positions, but was paid at the higher level secretarial salary until her demotion, pursuant to the new policy, to a Teachers' Aide position in 1994, at age fifty-five (55). When the policy became effective, Jett's salary was reduced from approximately $17,881 annually to $12,171 annually. No other secretary was immediately affected by the policy and there is no evidence in the record that any other employee was immediately affected by the policy.

During the litigation of this matter, the School Board advanced the name and documentation of (6) six employees whom it alleged, were also affected by a transfer and/or by the salary policy adopted by the School Board. (A-9).

REASONS THE WRIT SHOULD BE GRANTED

I. THE JUDGMENT RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH MADE ITS OWN FINDINGS OF FACT AND REVERSED THE JURY VERDICT AND THE TRIAL JUDGES' DECISION THAT A PRIMA FACIE CASE WAS ESTABLISHED, WARRANTS THIS COURT'S IMMEDIATE REVIEW.

Respondent asserts to this Court that Jett failed to raise the argument before the Eleventh Circuit that it was improper for that Court to inquire into the adequacy of her prima facie case, after she

prevailed at trial upon the merits.[1] As evidenced by the record, Respondent's contention is totally without merit.

Jett urged the Eleventh Circuit to adhere to the dictates of *Alexander v. Fulton County, Georgia*, 207 F. 3d 1303 (11th Cir. 2000), by submitting the case as supplemental authority, since the case was reported by the Eleventh Circuit after Jett's Brief was submitted. (Appendix, p. A-1& A-2, pargs. 1 & 2). The recent case and Jett's argument were advanced to the court long before the Eleventh Circuit reversed the jury verdict and prior to the oral argument of the parties before the Three Judge Panel in Montgomery, Alabama.[2] Additionally, Jett raised the issue before the Eleventh Circuit on pages 13 and 14 of her Petition for Rehearing En Banc.

Jett raised concerns that on appeal, the Eleventh Circuit should not substitute as the trier of fact, where a jury sat through two days of conflicting evidence, judged the credibility of the witnesses and determined that the School Board's motives were a pretext to discriminate against Jett. Contrary to the representation by Respondent, clearly the question of the relevancy or not of whether Jett had established a prima facie case, once the case reached the Eleventh Circuit, was raised below and therefore is not an issue of first impression before this court.

II. THE COURT OF APPEALS DECISION BELOW FAILS TO APPLY THE RULE ADVANCED BY THIS COURT IN *UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS V. AIKENS*

Respondent maintains that the Eleventh Circuit's decision below was consistent with the holding of *United States Postal Service Board of Governors v. Aikens. 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983),* because even though the Eleventh Circuit addressed whether Jett established a prima facie case, it ultimately held that Jett failed to prove that the School Board's proffered reason for the policy was a pretext for discrimination.[3]

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[1] Respondent's Brief, pp. 16-17.

[2] Oral Argument before the Eleventh Circuit in this matter was held on October 25, 2000.

[3] Respondent's Brief at pp. 17 & 18.

This finding of the Eleventh Circuit, disregards the holding of this court in *United States Postal Service*, which directed that once a discrimination case is fully tried on the merits, the factfinder must then decide whether the defendant intentionally discriminated against the plaintiff. *Id.* at 713. In *United States Postal Service* the District Court was the trier of fact because a bench trial was held; however in the case at bar, the jury was the trier of fact and not the Eleventh Circuit. The jury properly decided disputed issues of fact with regards to the adoption of the salary policy in favor of Jett. The Eleventh Circuit erred by independently reweighing the evidence presented at trial and overturning the jury verdict.

III. EVIDENCE IN THE RECORD SUPPORTS JETT'S REPRESENTATIONS TO THIS COURT THAT THE SALARY POLICY ONLY HAD AN IMMEDIATE AFFECT ON HER AND THAT AT LEAST ONE WHITE EMPLOYEES' SALARY WAS INCREASED OR REMAINED THE SAME AFTER HE WAS MOVED TO A LOWER POSITION.

The Respondent contends that the salary policy was adopted to save money and that Jett made recurring misstatements regarding the salary policy in her Petition for Certiorari.[4] However, the facts as set forth by Jett regarding the salary policy are supported by the record. Jett suffered an immediate adverse impact because of the salary policy. Jett was notified by the Superintendent, that due to the salary policy, effective July 1, 1994, she would be demoted and she would suffer a drastic pay reduction after (27) twenty-seven years of employment with the School Board. (See Jett's Petition for Certiorari at A-16). The record is devoid of any other notification of demotion or of salary reduction to any other employees, due to the salary policy.

The jury heard testimony from School Board Representative, Beverly Helms, regarding other employees the Board had advanced to demonstrate a similar affect on their salaries as Jett had suffered. Helms testified specifically regarding Plaintiff's Exhibit 3, which was a document prepared and submitted by the School Board during the course of this litigation. (Exhibit 3 is

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[4] Respondent's Brief, p. 3.

included in the appendix at A-3 through A-10. With regards to the Exhibit 3, Helms admitted before the jury that two employees (French and Showers), which the Board had advanced to establish similar treatment as the treatment accorded Jett, in actuality, were not affected by the salary policy. French and Showers were demoted with salary reductions five years and two years, respectively, before the effective date of the policy. (See also exerpts from Helm's testimony on this issue at A-14 through A-16).

Helms further testified that another employee the Board listed to establish similar treatment to Jett, in fact did not suffer a reduction in salary when he was moved from a higher paying position. Helms testified before the jury that when Jerry Tyre was moved from a principal position, which paid more, to the director of transportation position, his salary stayed about the same. (A-18, lines 14-25 and A-19, lines 1-19). In fact, Helms further testified that Tyre only received a $9,000 salary reduction when he was moved from the director of transportation position to a teaching position. A-19, lines 9-14. Here, the School Board chose not to save money when Tyre was moved from a principal position to the director of transportation position; yet, it chose to reduce Jett's salary at a time when she earned far less than Tyre was earning.

Therefore, whether the policy was actually adopted to save money and whether it was applied to Tyre in the same adverse manner that it applied to Jett was a disputed issue of fact. The totality of the evidence should have been considered by the Eleventh Circuit in the light most favorable to Jett to determine if reasonable jurors could have found discrimination. *Aikens*, supra at 827. The Eleventh Circuit erred by not so doing. The jury properly weighed the credibility of the witnesses and properly weighed the conflicting evidence and determined that the School Boards' motives were unlawful.

Because the Eleventh Circuit Court of Appeals decision effectively second-guessed the jury and failed to accord any deference to the District Court or to the jury, the decision below must be reversed.

CONCLUSION

For the foregoing reasons the petition for Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

October Term, 2001

No. _____

MARVIS JETT,

Petitioner,

vs.

WASHINGTON COUNTY SCHOOL BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX "A"

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Thomas K Kahn, Clerk
Attn: Ms. Jennifer Johnson
United States Court of Appeal
Clerk of the Court
56 Forsyth Street, N. W.
Atlanta, Georgia 30303

October 17, 2000

Re: **Marvis Jett v. Washington County School Board**
Court of Appeals No.: 00-13435-D

Dear Mr. Kahn:

Pursuant to 11th Cir. Rules 28 (j) and 28-4.I.O.P.-6, please allow the Plaintiff to refer the Court to a case which was reported by the Eleventh Circuit Court of Appeals, after the Appellee's Brief was submitted. The citation is as follows: *Alexander v. Fulton County, Georgia,* 207 F. 3d 1303 (11th Cir. 2000).

The case supports affirming the jury verdict as set forth in Appellee's Brief as referenced below. The significant findings of the court, in pertinent part are as follows:

(1) On appeal the Court must consider the sufficiency of all of the evidence presented and look beyond the evidence available when the motions for summary judgment and directed verdict were made. (Page 17 of Appellee's Brief).

(2) When the trier of fact has before it all of the evidence needed to decide the ultimate issue of whether the Defendant intentionally discriminated against the Plaintiff, whether the Plaintiff properly made out a prima facie case is "no "longer relevant". The jury is free to consider all of the evidence presented and to disbelieve the Defendant's articulated legitimate non-discriminatory reasons. (Pages *45-51* and *59-62* of Appellee's Brief).

(3) For jobs that require minimum training, a statistical comparison of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination; nevertheless, under the abuse of discretion standard, the admissibility of irrelevant statistical evidence is not grounds for reversal, unless the admission resulted in a substantial injustice to the Defendant. (Pages *51-59* of Appellee's Brief).

Enclosed please find the original and three copies of this letter as required by the rules. Feel free to contact me if you have any questions or concerns.

Sincerely,

Carolyn D. Cummings

cc: William R. Mabile, III, Esq.

Carolyn Cummings Barbara Hobbs Angela Wallace

A-3

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY, DIVISION

CASE NO. 5:99CV13-SPM

MARVIS JETT,

Plaintiff,

vs.

WASHINGTON COUNTY SCHOOL BOARD,

Defendant

_____/

AFFIDAVIT OF BEVERLY HELMS

STATE OF FLORIDA)
)
COUNTY OF WASHINGTON)

COMES NOW the undersigned, BEVERLY HELMS, after having been duly sworn, deposes and says:

1. My name is Beverly Helms and I am over the age of 21 years. I am the Director of Administrative Services for the Washington County School Board and have been so employed since 1980.

2. I am well acquainted with Marvis Jett and worked with her at the Washington County School Board administrative office from 1980 through 1989. I am personally knowledgeable of Marvis Jett's continued employment with the Washington County School Board at the district media center, Chipley High School and Roulhac Middle School. Ms. Jett continues to be employed with the Washington County School Board.

3. Through my employment with the Washington County School Board and in my position as Director of Administrative Services, I have personal knowledge of the allegations of race discrimination raised by Marvis Jett and the circumstances leading to her transfer from the district administrative office to the district media center, subsequent transfers to Chipley High School and Roulhac Middle School and the change in her position from secretary to teacher aide with a consequential reduction in salary and benefits.

4. Marvis Jett was employed as a secretary at the district office from 1967 until June 1989. Due to the reassignment of her duties and a need for less secretarial support at the district office, Ms. Jett was transferred from the district administrative office to the district media center beginning with the school year 1989 through 1990. While at the district media center, Ms Jett functioned as an aide, but continued in the secretary position at the same salary and benefits. Ms. Jett was not happy in her position at the media center and was assigned to Chipley High School. Ms. Jett worked in the Chipley High School library during school years 1990 through 1991 and 1991 through 1992. Although functioning as an aide, Ms. Jett continued in the secretary position with secretary's pay. Ms. Jett was reassigned to Roulhac Middle School at the beginning of the 1992 school year. Ms. Jett continues to be assigned to Roulhac Middle

School. During her first two years at Roulhac Middle School, 1992 through 1993 and 1993 through 1994, Ms. Jett continued in the secretary position at secretary pay, but was assigned aide duties.

5. On July 1, 1989, another district level secretary, Sandra French, a white female was transferred from a level five secretary to level six secretary. The transfer was the result of inadequate performance attributed to health related problems. As a consequence of the transfer, Ms. French suffered a reduction in salary of $539.00. Her new salary was consistent with the pay of the level six secretary position to which she had been transferred.

6. In April 1992, Delphine Griggs, a white female who was the district media coordinator was transferred to media specialist at Kate Smith Elementary School. Because Mantis Jett was performing duties as an aide, but being paid commensurate with a secretarial position, the School Board treated Delphine Griggs similarly and she retained her pay even though her responsibilities had changed. The practice of not reducing pay when employees were transferred was continued until July 1, 1994.

7. On July 1, 1992, Edwina Showers, a white female, was transferred from a level two support position at the district office to a level four position. As a consequence, her salary was reduced from $25,342.00 to $20, 855.00. Unlike Marvis Jett and Delphine Griggs, Ms. Showers was not permitted to retain her higher level salary.

8. In April 1993, the principal of Roulhac Middle School recommended Marvis Jett's continued employment. Commensurate with her actual duties, the principal's recommendation was for Ms. Jett to continue

employment as a teacher aide. For four years, Marvis Jett had performed aide duties while being paid at the higher secretarial rate. Although recommended to continue her employment as a aide and not as a secretary, Ms. Jett's pay was not reduced because of the expressed desire of the superintendent to affect her in the least adverse manner possible.

9. On May 10, 1993 Phil Flater, a white male, who was the principal at Chipley High School was recommended to be placed at Chipley High School and Roulhac Middle School as a teacher. His salary was to be based on the appropriate line of the teacher salary schedule and he was to be returned to a continuing contract. At that same meeting Pat Williams was recommended to be assigned to Chipley High School as Principal for 1993-94. His rate of pay was recommended to continue at the current placement on the administrative which was higher than the salary schedule for a High School Principal. The Board voted unanimously to table the recommendation of Mr. Flater "until the Board could consider a policy for this type transfer and salary plus to check back for the last 15 years and see how this same action was handled." They also voted (3-2) to table the recommendation of Pat Williams" until the information on Flater's recommendation was presented to the board". At that time the Board requested that a policy be developed for their review that would discontinue the practice of paying employees at a salary not commensurate with their duties.

10. On June 14, 1993 the Board approved the recommendation that Phil Flater remain on "the present administrative salary schedule. Beginning with the fiscal year 1994-95, his salary will be at the appropriate place on the instructional salary schedule with continuing contract status". They also approved the recommendation of Pat Williams. On July 12, 1993, the School Board held the public hearing,

consistent with the requirements of the Administrative Procedures Act, on the proposed policy addressing transfers and commensurate pay. Following the public hearing, the Board approved the proposed policy to become effective July 1, 1994, to require that individuals be paid at a level commensurate with the salary rate of the position to which they were assigned.

11. In the spring of 1994, Jerry Tyre, a white male, was recommended to be transferred from the position of Director of Transportation to a teaching position. The School Board agreed to Jerry Tyre remaining in the Director of Transportation position though the month of July 1994.

12. On July 1, 1994, Calvin Stevenson, a white male, was transferred from the principal position at Roulhac Middle School to be principal of Kate Smith Elementary School. Pursuant to the Board's new policy, Mr. Stevenson's salary was reduced.

13. On July 1, 1994, as a consequence of the Board's new policy, the salaries of all individuals who were being paid at a level not commensurate with their duties, were adjusted and reduced. On August 1, 1994, Jerry Tyre, the former Director of Transportation assumed a teaching position at Vernon High School and his pay was reduced commensurate with the new position. Jerry Tyre is currently the Superintendent of Schools for Washington County having been elected in 1996. Marvis Jett's salary was reduced on July 1, 1994. The practice of paying an individual at a level not commensurate with their duties ended with the passage of the Board's new policy on July 1, 1994. Pat Williams' salary was commensurate with the approved salary schedule for high school principals.

14. Currently there is no Washington County School Board employee who is receiving pay that is not commensurate with the position to which the employee is assigned. Marvis Jett, unlike most aides, has been allowed to work during the summer school in order to ameliorate the impact of the new pay policy.

15. The practice of paying individuals at a level not commensurate with their duties began with Marvis Jett's transfer to the district media center in July 1989. The practice ended with the passage of the Board's new policy on July 1, 1994.

16. The names of the individuals affected by a transfer and/or the School Board's new policy and their race, position titles, initial date of employment and rates of salary are listed below.

Name	Race	Position Titles	Initial Date of Employment	Pay Prior to Adjustment	Pay Following Adjustment
Phil Flater	White	Principal to Teacher	01/09/73	$50,509.38	$40,347.29
K Sandra French	White	Level 5 Secretary to Level 8 Secretary	08/01/79	$16,233.00	$15,694.00
Delphine Griggs	White	District Media coordinator to Media Specialist	02/19/73	$46,010.97	$42,159.43
Marvis Jett	Black	Secretary to Aide	10/02/67	$17,881.42	$13,293.01
Edwina Showers	White	Payroll Specialist to Data Entry	06/66	$25,342.00	$20,855.00
Calvin Stevenson	White	Middle School Principal to Elementary School Principal	03/15/68	$49,724.14	$47,693.00
Jerry Tyre	White	Director of Transportation to Teacher	06/17/68	$47,486.11	$38,828.80

17. There were no vacancies for secretaries between 1989 and 1994 in any school or at the district office. In the 1994 through 1995 school year, a secretary at Kate Smith Elementary School applied for and received a promotion to the data center. Another secretary from the Washington-Holmes Technical Center was transferred to fill her position. The transfer was made to reduce overstaffing at the technical center. In the 1995 though 1996 school year, Loretta Cook, a secretary at the district office, was transferred to the technical center to a level seven secretary position. Her transfer was made to further reduce staff at the district office and resulted in a reduction in pay for Ms. Cook.

18. Since 1994, only one secretary position has become available at the district administrative office. Mary Wagner, a black female, was hired as a secretary in April, 1999. Marvis Jett has not made a written request for transfer or made application for any position with the School Board since her transfer in 1989. The only other openings at the district office in recent years have been above the secretary level and all were in the finance department. These were openings for Director of Finance, Assistant Director of Finance, Finance Specialist and Coordinator of Finance.

19. Prior to Marvis Jett's transfer to the media center in 1989, the primary function for which she had been responsible, that is, attendance and property, were transferred to the Director of Administrative Services (me). After the transfer of Ms. Jett's primary functions, Ms. Jett was given a variety of assignments by various administrators on a day-to-day basis.

FURTHER AFFIANT SAYETH NOT.

Beverly Helms
Dr. Beverly Helms

The foregoing instrument was acknowledged before me this 29th day of June, 1999, by BEVERLY HELMS, who is personally known to me and who did not take an oath.

Signature of Notary Public

Judy L. Daniels
Signature of Notary Public

Judy L. Daniels
(Printed name of Notary Public)

My Commission Expires:

JUDY L. DANIELS
MY COMMISSION # CC 713794
EXPIRES: March 23, 2002
1-800-DO-NOTARY Fla. Notary Services & Bonding Co.

A. Yes, I did.
Q. And you swore that the information you gave under oath was truthful?
A. That's correct.
Q. So now you have before you, Ms. Helms, two documents where you have sworn that you were telling the truth in those documents; is that correct?
A. That's correct.
Q. Now, Plaintiff's Exhibit 2, I would like to direct you back to Plaintiff's Exhibit Number 2, and ask you to direct your attention to -- I'm sorry -- Plaintiff's Exhibit Number 3, the one I just recently gave you.

Direct your attention to paragraph number 16. Will you read that paragraph for the jury?
A. The names of the individuals affected by the transfer and/or the school board's new policy and their race, position, titles, name and dates of salary are listed below.
Q. Okay. I'm sorry. We got lost.
A. Yes, I'm sorry. If you would repeat the question.
Q. Okay. We are looking now at Plaintiff's Exhibit Number 3, which you have sworn to under oath; is that correct?
A. Yes, ma'am.

Q. Isn't it true, Ms. Helms, that some of the information you provided in this particular affidavit is real misleading?
A. Not to my knowledge.
Q. Isn't it true that you provided the names of seven Washington County school board employees, and their salary cuts to show that they were treated similarly to the way that Ms. Jett was treated in this document?
A. Right. I submitted the names of the individuals who were affected by the policy.
Q. That is correct?
A. Or who have been transferred and were affected by a cut in salary.
Q. Okay. So will you turn the page to page 7. And those seven individuals that are listed on page 7 are those seven individuals you submitted for comparison to Ms. Jett?
A. Yes, it is.
Q. But they weren't all treated similarly to Ms. Jett, were they, Ms. Helms?
A. They were.
Q. None of those individuals were involuntarily moved out of their job and positions, were they?
A. They were all involuntarily removed. None of them chose

to make the move.
Q. None of them were involuntarily placed into the positions that they were moved from; were they, Ms. Helms?
A. They were all involuntarily transferred from the position they held to the position that is shown on the paper.
Q. Well, let's start with Mr. Flater, the first individual

that you have listed. And am I correct that you have indicated he was in a principal position and he was moved to a teacher's position; is that correct?
A. Yes, ma'am.
Q. Now, will you tell the jury whether or not Mr. Flater was involuntarily placed in a principal position?
A. He wasn't involuntarily. He made application for that position.
Q. And he, in fact, enjoyed a salary of $50,590 in that position, didn't he?
A. That's correct.
Q. So he didn't -- so he was not involuntarily placed in that position, was he, Ms. Helms?
A. In the principal's position?
Q. That's correct.
A. No, he chose to apply.
Q. Now, isn't it true that Mr. Flater was

removed as a
principal to a teacher as a direct result of a new superintendent being elected?
A. I'm not sure if that is the only criteria. But he was changed as a result of a new superintendent?
Q. Now, I would like to direct your attention to the second individual you have listed, Sandra French. Now, isn't it true that Ms. French's salary was reduced because she was demoted because of job performance?

A. That's correct.
Q. So she wasn't similarly treated the way that Ms. Jett was treated, was she?
A. To my knowledge, she was. She was demoted. She was changed in her position.
Q. And when you say she, you are referring to Ms. Jett or Ms. French?
A. Ms. French.
Q. Ms. French was demoted because of job performance; is that correct?
A. Well, there was some medical problems. She went on medical leave.
Q. But you are not telling the jury that she was demoted because of a medical condition are you?
A. No. That affected her performance.

Q. Isn't it true, Ms. Helms, that that demotion occurred in
1989, five years before that school board policy was passed?
A. That's correct.
Q. So Ms. French was not affected by that school board
policy, was she?
A. No. The policy was not in effect at the time she was
demoted. Her pay was commensurate with her demotion.
Q. But yet you have listed her on this list to compare her
to Ms. Jett?
A. That is correct. Because Ms. Jett was demoted. Her

salary was not reduced commensurate with the demotion as
Ms. French was.
Q. But there is no indication in Ms. Jett's personnel file
or any other file that she had problems with job performance;
is that correct?
A. That's correct.
Q. Is it true, Ms. Helms, that Ms. French is the only
secretary listed on your chart?
A. No, that is not correct.
Q. Other than -- I'm sorry. Let me finish. Isn't it true

that Ms. French is the only secretary listed on this chart
other than Ms. Jett?
A. Ms. French? Did you -- I'm sorry.
Q. Ms. French?
A. Is the only secretary other than Ms. Jett. Ms. Showers is not technically a secretary, but is support staff in the district office.
Q. So will you answer my question? Then it's true that
Ms. French is the only other secretary listed on this chart
other than Ms. Jett?
A. That's correct.
Q. Now, I direct your attention back then to Ms. Showers
with -- her salary cut had nothing to do with that new policy
change in 1994, did it?
A. That's correct.

Q. Okay. In fact, her reduction of salary was effective
two years before that policy change came in effect, wasn't it?
A. That is right.
Q. Now, I would like to direct your attention to Mr. Calvin
Stevenson. His reduction in salary had nothing to do with
that policy change; did it either, Ms. Jett?
A. Yes. His did.
Q. Will you tell the jury -- well, let me ask it this way.

Mr. Stevenson was not involuntarily placed in his position as the principal of the middle school, was he?
A. Well, yes, he was, because he was previously the elementary principal. And he was transferred to the middle school as the principal.
Q. So he wasn't involuntarily placed -- well, he wasn't involuntarily taken out of a principal job and put into a lesser principal job, was he, or a lesser job? He maintained the same title as principal?
A. The same title.
Q. So he enjoyed the position of principal at the middle school to the tune of $49,724, didn't he?
A. Yes, ma'am.
Q. And even if -- it might have been sort of involuntary, he could hardly complain about that salary, could he?
A. I don't know whether he could complain or not.
Q. Would you complain at that salary, Ms. Helms?

A. It would depend on what I was making if I were transferred.
Q. But now, isn't it true, looking at his salary as middle

school principal, and his salary as elementary school principal, that the difference in his pay from one position to the other was not as great as the reduction in Ms. Jett's salary, and she was making three times less than he was making?

A. His reduction was not as great.

Q. Will you tell the jury his reduction?

A. Twenty-one hundred.

Q. Two thousand one hundred dollars?

A. Yes. Just about.

Q. Now, the last individual you have listed is Mr. Jerry Tyre?

A. Yes, ma'am.

Q. And your chart indicates that Mr. Tyre was director of transportation earning $47,486 a year; is that correct?

A. Yes, ma'am.

Q. Now, isn't it true that Mr. Tyre was also not involuntarily placed into a $47,000 a year job?

A. He was involuntarily moved from his role as a principal to the director of transportation.

Q. And he didn't suffer a salary cut in that move, did he? In fact, his salary went up, didn't it?

A. It probably stayed about the same. He was a high school principal.
Q. So in comparing -- even if you would try to compare Mr. Tyre to Ms. Jett, we don't have the same factors as far as being involuntarily thrust into a lesser position; is that correct?
A. That's not my understanding.
Q. What is your understanding, Ms. Helms?
A. Well, my understanding is he was moved from the high school principal's position which did pay more than the director of transportation to the director of transportation. That was not his choice. Then he was moved from the director of transportation to teacher. That was not his choice. And he realized a nine thousand dollar cut.
Q. But isn't it true, Ms. Helms, that Mr. Tyre was serving at the pleasure of whoever the superintendent and the board was at that particular time?
A. We all serve at the pleasure of the superintendent and board.
Q. Isn't it true that when you have those high level administrative positions, you expect some administrative

changes when the administration changes?
A. We all serve on an annual contract.
Q. Isn't it customary to expect some changes when administrations come in to the Washington County school board,

Ms. Helms?
A. It depends. It really depends on who the person coming in is.
Q. But wasn't the change that -- that was directed at Mr. Tyre that particular time the direct result of a change in administration?
A. The two -- the two changes were with different administrations. The first was with one switch, and then the change from transportation to the other was with another.
Q. And will you tell the jury, after Mr. Tyre was changed from director of transportation to a teacher position, can you tell the jury what his salary was?
A. 38,828.
Q. Now, Ms. Helms, I would like to direct your attention to page 12 of -- let's see -- Plaintiff's Exhibit 2. I'm sorry -- no. Yes. I'm sorry. Plaintiff's Exhibit 2. I would like to go back to that second sentence on

page 12.
And I think you have read that: Due to consistently adverse audit related -- audit findings related to property, the superintendent transferred the property function from the plaintiff to the director of administrative services. Is that correct?
A. Yes, ma'am.
Q. And will you tell the jury who the director of